IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-575, 78-597, 78-604

No. 78-575

SOUTHERN RAILWAY COMPANY,
Petitioner

v.

SEABOARD ALLIED MILLING CORP., ET AL.,
Respondents

No. 78-597

INTERSTATE COMMERCE COMMISSION,
Petitioner

v.

SEABOARD ALLIED MILLING CORP., ET AL.,
Respondents

No. 78-604

SEABOARD COAST LINE RAILROAD COMPANY, ET AL.,
Petitioners

v.

SEABOARD ALLIED MILLING CORP., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONERS SEABOARD COAST LINE RAILROAD COMPANY, ET AL.

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This Reply Brief is submitted generally in response to the Briefs of Respondents and *Amicus Curiae* Intervenors Potomac Electric Power Company, *et al.*

I.

THE CHARACTERIZATION OF THE CASE BY ALL RESPONDENTS OBFUSCATES THE SINGULAR, AND CRITICAL QUESTION ON WHICH THIS COURT SHOULD RULE, *I.E.*, WHETHER THERE IS A STATUTORY MANDATE THAT A PRELIMINARY DETERMINATION ON LAWFULNESS MUST BE MADE OR WHETHER THE STATUTE *ALLOWS* A PURELY DISCRETIONARY EVALUATION IF THE COMMISSION CHOOSES TO MAKE AN EVALUATION?

There is a general assumption throughout the filings made by Respondents, including the *Amicus Curiae* Intervenors, that the Commission must make a decision on each allegation which is made in protest to rate publications before the rates become effective. Research does not disclose that there has ever been, or that there was ever any intent that there would be, a mandatory review and opinion by the Commission (or any subordinate body of the Commission) as a result of the filing of a protest. The Commission takes jurisdiction only if it chooses to take jurisdiction. In this case the Commission did not take jurisdiction.

While the Commission has promulgated regulations setting out a basic format for the orderly progression of suspension stage filings, there is nothing that requires the Commission actually to conduct a suspension stage review. All Respondents have assumed that there is a right in law to Commission action when in fact Congress could not have been clearer[1] when it carefully drafted the permissive statutory language.

This Court has been perhaps overburdened with the repetition of the history of the Mann-Elkins Act[2] and the

[1] The Commission if it does investigate, is not even required to conclude its investigation with a finding on lawfulness.

[2] 36 Stat. 539(1910)

temper of the times within which the Act was passed. However, it is clear that until the Act was passed, there had been no ability on the part of the Commission to take any action on railroad rates until they became effective. It was a drastic departure from all prior concepts of regulation for the Commission to be allowed to interfer with railroad rate initiation. Clearly, Congress did not intend for the Commission to initiate investigations, try and make final determinations on all allegations of unlawfulness brought to its attention through protest. Indeed, Congress and the Courts have been absolutely silent on how the Commission should proceed. Especially in the Briefs of Seaboard Allied Milling Corp., *et al.*, and Board of Trade of Chicago, *et al.*, the arguments all assume that discretion does not mean discretion and that the Commission is held to a very high standard on the kind and extent of review that it *shall* make. This position is just plain inconsistent with the clear language of Section 15(8)(d) which does not even require the Commission to suspend or investigate *even if substantial injury and probability of success on the merits is shown through verified statement.* Very simply stated, the Interstate Commerce Commission has no duty under Section 15(8) [49 U.S.C. §10707] of the Interstate Commerce Act.

The Congressional restrictions on the discretionary powers, since the inception of the provision, varied only as to length of time within which the Commission would be forced to render a decision until the enactment of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub.Law No. 94-210-90 Stat. 36. In an effort to relax rate regulation, Congress placed specific limitations on the discretion open to the Commission. Among those restrictions and most critical to this case are those stated at 15(8)(d):

> "(d) The Commission *may not* suspend a rate under this paragraph unless it appears from

specific facts shown by *the verified complaint* of any person that—

> (i) Without suspension the proposed rate change will cause substantial injury to the complainant or the party represented by such complaint; and
>
> (ii) It is likely that such complaint will prevail on the merits." (Emphasis added)

As these Petitioners have argued from the beginning of this entire matter, the Respondents in this case did not meet either of those requirements in the protest filed with the Commission. This is especially true in regard to Section 4(1) [49 U.S.C. §10726]. Again, the Court's attention is drawn to the fact that the actual verified protest to the Commission did not even mention specific Section 4(1) violations. The violations were raised in the Petition to Reject and in a supplement to that Petition. Neither of these documents were verified. Also of critical importance is the fact that the initial Petition to Reject did not even show that there was a violation, *Respondents were simply wrong.* Yet the Respondents now argue to this Court that an admittedly erroneous allegation was sufficient to meet the requirements set out by Congress in Section 15(8)(d) to *alert* the Commission and to *require* it to take discretionary action. Further, it is most disconcerting that Respondents maintain that the supplemental filing, made literally at the eleventh hour, and the filings before the Eighth Circuit *required* the Commission to exercise its discretionary powers. There is no technical legal principle involved here; there is simply a matter of fairness. It is unfair to discredit the Commission on the basis of its evaluation of information it received too late adequately to consider or on information never placed before it for review. Congress, the railroads and the courts justifiably expect a high degree of performance from the Interstate Commerce Commission, but asking them to be clairvoyant and to evaluate affidavits received too late to review or not received at all is simply ridiculous.

II.

THERE WAS NO EVIL INTENT ON THE PART OF THE RAILROADS WHICH SOUGHT TO AND DID PUBLISH THE SEASONAL RATES WHICH BROUGHT THIS MATTER TO THIS COURT FOR REVIEW.

Respondents, especially Seaboard Allied Milling Corp., *et al.*, tell this Court that there was clearly a blatant attempt on the part of the railroad petitioners to violate the law. This is simply factually incorrect. It was not until the Petition to Reject was received on or about September 8, that the Railroads' attention was brought to the fact that there was a possibility of a Section 4(1) violation. Then, with all protests to answer in an abbreviated response time, there was only time to request a tariff check of the alleged violation. There was no violation and there was, therefore, no reason for the railroads even to suspect that there were "hundreds" (Seaboard Allied Brief p. 28) of violations as alleged by the Respondents in their Brief to the Lower Court and to this Court. *There was nothing to be gained by the Railroads in ignoring Section 4 of the Act.*

While it is not possible to speak specifically for the Commission, it has always been the Railroad Petitioners' interpretation that the Commission did not believe that there were long-and-short haul violations. Unlike the characterization of the Commission's attitude made by Seaboard Allied Milling Corp., *et. al.*, *i.e.*, that the Commission arrogantly brushed aside the violations, it is more reasonable to interpret its action as a result of the fact that sufficient verified evidence had not come before it to

show that there were any departures from the long-and-short haul requirements. But that, since application had not been filed and the issue had belatedly been raised, it was prudent on their part to admonish the Railroads that the failure to act on the issue was *not* tacit approval *if any* violations existed.

III.

THE INTENT OF CONGRESS IN ENACTING SECTION 4(1) [49 U.S.C. §10726] WAS TO PREVENT UNFAIR COMPETITIVE PRACTICES THAT WOULD SUBSTANTIALLY HARM OTHER FORMS OF COMMON CARRIAGE SINCE THE RAILROAD INDUSTRY WAS FINANCIALLY SOUND AND THE FLEDGLING BARGE LINES WERE NOT; A SITUATION WHICH TIME HAS REVERSED.

This very short section is added specifically to respond to the continuing claim made by Seaboard Allied Milling, *et. al.*, that substantial harm has been occasioned to the public merely because of possible technical violations of Section 4(1) of the Interstate Commerce Act. Congress clearly intended Section 4(1) to protect other common carriers *not shippers*. Shippers were sufficiently protected under other sections of the Act.

A very conscientious search of the record and the arguments made by the Respondents fail to show exactly what this "substantial harm" is or how it would have been occasioned by a Section 4 departure. The harm, if any, would have to be as a result of violations of other sections of the Interstate Commerce Act that forbid discrimination, preference or prejudice between or among shippers. This fact brings us back to the clear failure of the Respondents to meet initially the burden of proof exacted against them by Congress in Section 15(8)(d) [49 U.S.C. §10707] of the Interstate Commerce Act.

While Respondents have attempted to now state that they too disagree with the lower Court's opinion and that indeed the question is not whether a decision not to investigate a rate is reviewable but whether a decision *not to suspend* and investigate is reviewable, it is clear that the only issue properly before this Court is the former. Even a cursory review of the entire Appendix shows that there was such confusion in the filings that there was no clear basis for investigation. There was not sufficient definition for a clearly defined investigation and, in the opinion of Railroad Petitioners, it was only logical for the Commission to forego a precipitious investigation until the issues, if supportable, were defined in formal complaint.

IV.

***AMICUS CURIAE* INTERVENOR, POTOMAC ELECTRIC POWER COMPANY, *ET AL.*, PLACES UNWARRANTED EMPHASIS ON A WRITTEN RATHER THAN A SILENT DECISION AND ON THE RECODIFIED LANGUAGE OF THE INTERSTATE COMMERCE ACT.**

Initially, it is the petitioning railroads' position that the broad question raised by the intervenor need not be approached in this proceeding. General increase cases are fundamentally different from the type of increase which prompted the procedural questions now before this Court and it would serve no good purpose to apply the findings on the peculiar facts of this case to all general increase cases.

It is interesting that Intervenor argues that the mere fact that a written document issues from the Commission establishes that a sufficient hearing on the merits of the case has been given to justify judicial review. Regardless of the type of document that might issue from the Interstate Commerce Commission during or at the end of

a suspension period, the document alone does not elevate a decision not to investigate to a full hearing on the merits of a rate increase. Nor, as is particularly important to this case, does it indicate that a final decision has been made on each allegation raised and that that is the reason that the discretionary ability to institute an investigation has not been exercised. It simply means the Commission, because of public interest,[3] gives formal notification. The same type of information as that included in the Commission Order [Appendix page 288] in issue here could be learned by interested parties by attending an open conference. The Commission simply said it was not convinced that it should take any action.

The re-codification of the Interstate Commerce Act states specifically that no substantial changes are made or intended to be made. The intent of the original framers of all the provisions must then control. There is simply no argument.

V.

CONCLUSION

The Respondents' arguments to this Court are all based on a hearing on the merits that was never held. The lower court decision should be reversed.

Respectfully submitted,

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[3] Public interest is used in a non-technical sense.